

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CYNTHIA BOYD,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner  
of the Social Security Administration,

Defendant.

CASE NO. 11-cv-6030-BHS-JRC

REPORT AND  
RECOMMENDATION ON  
PLAINTIFF'S COMPLAINT

Noting Date: February 1, 2013

This matter has been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261, 271-72 (1976). Both parties have filed a brief, including plaintiff's Opening Brief and defendant's Response (*see* ECF Nos. 15, 19).

In this matter, the ALJ erred by relying solely on evidence offered by non-examining, records reviewers over the opinions of all of the doctors who examined or

1 treated plaintiff. Specifically, the ALJ rejected all of the examining and treating doctors'  
2 opinions in a general summary statement, finding that all of the opinions from doctors  
3 who examined plaintiff were unsupported by objective clinical findings and were  
4 inconsistent with the overall evidence. Not only were the doctors' opinions supported by  
5 their own objective clinical findings, but also, an ALJ must explain why doctors'  
6 opinions are rejected. A summary statement is insufficient to explain the rejection of all  
7 of the opinions from treating and examining doctors.

8  
9 The ALJ also erred by failing to discuss lay evidence. Therefore, this matter  
10 should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the  
11 Commissioner for further consideration.

#### 12 BACKGROUND

13 Plaintiff, CYNTHIA BOYD, was twenty five years old on her date of alleged  
14 disability onset of December 15, 2003 (*see* Tr. 18, 129). Plaintiff finished eighth grade  
15 and did not obtain a GED (*see* Tr. 39). She testified that she stopped working as a  
16 registered nursing assistant ("R.N.") in 2003 because she was experiencing severe  
17 vertigo, anxiety and panic attacks (*see* Tr. 40). She had worked as a R.N. for  
18 approximately six years, since she was sixteen years old (*see* Tr. 39-40). At the time of  
19 her administrative hearing, plaintiff had at least the severe impairments of diabetes  
20 mellitus, Meniere's disease; coarctation of the aorta; asthma; obesity; affective disorder;  
21 and anxiety disorder (*see* Tr. 20).

22  
23 Plaintiff started suffering from vertigo when she was twenty three years old (*see*  
24 Tr. 41). Although she was in an accident when she was thirteen years old, she was twenty

1 three when she first woke up in the middle of the night with severe dizziness (*id.*). At the  
2 time, plaintiff's doctors determined that she had Meniere's Disease (*id.*). However,  
3 according to plaintiff, for the first time in ten years, one of plaintiff's doctors now has  
4 questioned that diagnosis due to a change in plaintiff's symptoms (*id.*). Plaintiff's ringing  
5 in her ears has decreased, her vertigo has increased and she began vomiting more often  
6 (Tr. 41-42).

7  
8 Plaintiff testified that her anxiety and depression began when her vertigo started,  
9 when she was twenty three years old (*see* Tr. 45). She testified that she had been taking  
10 medication continuously for her mental impairments since that time (*see id.*). Plaintiff's  
11 testimony differs from the ALJ's unexplained contrary finding that plaintiff had not been  
12 taking any psychoactive medication (*see* Tr. 21).

13 Plaintiff testified that she had started mental health counseling only recently, as  
14 she had not been advised to initiate such counseling previously (*see id.*). She also  
15 suggested that part of her reluctance to attend mental health counseling was because she  
16 didn't go out of the house (*see* Tr. 47). She indicated that she "really would have liked if  
17 they would come and visit me at my home but that was not going to happen" (*id.*).

18 Plaintiff testified that the only other mental health counseling that she had received was a  
19 yearly appointment with a therapist (*see* Tr. 46).

20 Plaintiff also testified regarding her aortic coarctation (*see* Tr. 47-48). Plaintiff had  
21 open heart surgery when she was two months old and testified that her valve still  
22 regurgitated blood back into her heart (*see* Tr. 47). This condition was being watched by  
23  
24

1 her doctors and she testified that no further treatment was required at that time for her  
2 coarctation of the aorta (*see* Tr. 48).

### 3 PROCEDURAL HISTORY

4 On March 22, 2007, plaintiff filed applications for a period of disability and  
5 disability insurance benefits (“DIB”) pursuant to Title II, and for supplemental security  
6 income (“SSI”) pursuant to Title XVI (*see* Tr. 18, 129-32; *see also* Tr. 123-28, 133-36).  
7 Her applications were denied initially and following reconsideration in June and  
8 September, 2007 respectively (77-80, 86-89). Plaintiff’s requested hearing was held  
9 before Administrative Law Judge Gary J. Suttles (“the ALJ”) on March 24, 2010 (*see* Tr.  
10 35-70). On April 21, 2010, the ALJ issued a written decision in which he found that  
11 plaintiff was not disabled pursuant to the Social Security Act (*see* Tr. 15-29).  
12

13 On October 13, 2011, the Appeals Council denied plaintiff’s request for review,  
14 making the written decision by the ALJ the final agency decision subject to judicial  
15 review (Tr. 1-3). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court,  
16 seeking judicial review of the ALJ’s written decision (*see* ECF Nos. 1, 4). Defendant  
17 filed the sealed administrative record regarding this matter (“Tr.”) on May 15, 2012 (*see*  
18 Tr. 10, 11). In her Opening Brief, among other issues contested, plaintiff contends that  
19 the ALJ erred in his review of the lay evidence and in his review of the medical evidence  
20 offered by treating doctor, Dr. Fleischman; and examining psychologists, Drs. Brown,  
21 Wheeler and Krueger (*see* ECF No. 15, pp. 12-13). Plaintiff contends that the ALJ erred  
22 in relying solely on evidence offered by non-examining, records reviewers over the  
23 opinions of all of the doctors who examined or treated plaintiff (*see id.*).  
24

## STANDARD OF REVIEW

Plaintiff bears the burden of proving disability within the meaning of the Social Security Act (hereinafter “the Act”); although the burden shifts to the Commissioner on the fifth and final step of the sequential disability evaluation process. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999); *see also Johnson v. Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995); *Bowen v. Yuckert*, 482 U.S. 137, 140, 146 n. 5 (1987). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment “which can be expected to result in death or which has lasted, or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff’s impairments are of such severity that plaintiff is unable to do previous work, and cannot, considering the plaintiff’s age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)); *see also Richardson v. Perales*, 402 U.S.

1 389, 401 (1971). Regarding the question of whether or not substantial evidence supports  
2 the findings by the ALJ, the Court should “review the administrative record as a whole,  
3 weighing both the evidence that supports and that which detracts from the ALJ’s  
4 conclusion.” *Sandgathe v. Chater*, 108 F.3d 978, 980 (1996) (per curiam) (quoting  
5 *Andrews, supra*, 53 F.3d at 1039). In addition, the Court must independently determine  
6 whether or not “the Commissioner’s decision is (1) free of legal error and (2) is  
7 supported by substantial evidence.” See *Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir.  
8 2006) (citing *Moore v. Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir.  
9 2002)); *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996).

11 According to the Ninth Circuit, “[l]ong-standing principles of administrative law  
12 require us to review the ALJ’s decision based on the reasoning and actual findings  
13 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the  
14 adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219, 1226-27  
15 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation  
16 omitted)); see also *Molina v. Astrue*, 674 F.3d 1104, 1121, 2012 U.S. App. LEXIS 6570  
17 at \*42 (9th Cir. 2012); *Stout v. Commissioner of Soc. Sec.*, 454 F.3d 1050, 1054 (9th Cir.  
18 2006) (“we cannot affirm the decision of an agency on a ground that the agency did not  
19 invoke in making its decision”) (citations omitted). For example, “the ALJ, not the  
20 district court, is required to provide specific reasons for rejecting lay testimony.” *Stout*,  
21 *supra*, 454 F.3d at 1054 (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).  
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23  
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DISCUSSION

**1. The ALJ erred by failing to review the lay evidence offered by plaintiff's sister, Ms. Malissa Ratliff ("Ms. Ratliff").**

Pursuant to the relevant federal regulations, in addition to "acceptable medical sources," that is, sources "who can provide evidence to establish an impairment," *see* 20 C.F.R. § 404.1513 (a), there are "other sources," such as friends and family members, who are defined as "other non-medical sources," *see* 20 C.F.R. § 404.1513 (d)(4), and "other sources" such as nurse practitioners and chiropractors, who are considered other medical sources, *see* 20 C.F.R. § 404.1513 (d)(1). *See also* *Turner v. Comm'r of Soc. Sec.*, 613 F.3d 1217, 1223-24 (9th Cir. 2010) (*citing* 20 C.F.R. § 404.1513(a), (d)); Social Security Ruling "SSR" 06-3p, 2006 SSR LEXIS 5, 2006 WL 2329939. An ALJ may disregard opinion evidence provided by "other sources," characterized by the Ninth Circuit as lay testimony, "if the ALJ 'gives reasons germane to each witness for doing so.'" *Turner, supra*, 613 F.3d at 1224 (*citing* *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001)); *see also* *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). This is because in determining whether or not "a claimant is disabled, an ALJ must consider lay witness testimony concerning a claimant's ability to work." *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1053 (9th Cir. 2006) (*citing* *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

Here, the ALJ failed to consider the lay witness statement offered by Ms. Ratliff, committing legal error. *See id.* (*see also* Tr. 162-69). Although defendant contends that Ms. Ratliff's statement did not need to be discussed because she did not provide any

1 opinions on the issue of how plaintiff's impairments impacted her ability to work, the  
2 Court does not agree, as discussed below (*see* Response, ECF No. 19, p. 3).

3 Defendant also offers various reasons as to why the lay evidence could have been  
4 rejected, however none of those reasons actually were offered by the ALJ as a reason to  
5 discount Ms. Ratliff's statements, giving these arguments little basis in law in the context  
6 of this case. *See id.*; *see also Bray, supra*, 554 F.3d at 1226-27 (*citing Chenery Corp.*,  
7 *supra*, 332 U.S. at 196 (other citation omitted)) ("[l]ong-standing principles of  
8 administrative law require us to review the ALJ's decision based on the reasoning and  
9 actual findings offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit  
10 what the adjudicator may have been thinking"). As indicated by the Ninth Circuit, "the  
11 ALJ, not the district court, is required to provide specific reasons for rejecting lay  
12 testimony." *Stout, supra*, 454 F.3d at 1054 (*citing Dodrill v. Shalala*, 12 F.3d 915, 919  
13 (9th Cir. 1993)).

15 On April 13, 2007, almost a year before plaintiff's insured status expired on  
16 March 31, 2008, her sister, Ms. Ratliff provided a lay witness statement (*see* Tr. 162-69).  
17 For example, Ms. Ratliff indicated that plaintiff had problems getting along with others  
18 as she was edgy and anxious and had anger problems (*see* Tr. 166). Specifically, Ms.  
19 Ratliff indicated that plaintiff was fired or laid off from a nursing home job because she  
20 "could not get along w[ith her] boss" (*see* Tr. 168). Ms. Ratliff also indicated that  
21 plaintiff's impairments affected plaintiff's ability to complete tasks; concentrate;  
22 understand; follow instructions; get along with others; drive; or be alone (*see* Tr. 167,  
23 168). Regarding physical limitations, Ms. Ratliff indicated that plaintiff could not squat  
24



1 without falling over and she could walk only for about ten minutes (*see* Tr. 167). Ms.  
2 Ratliff opined that plaintiff's impairments affected plaintiff's ability to lift, squat, bend,  
3 walk, and kneel (*id.*).

4         The Court finds that Ms. Ratliff's statements regarding plaintiff's impairments and  
5 their resulting functional limitations relate directly to the question of how plaintiff's  
6 impairments affected her ability to work. Therefore, the Court is not persuaded by  
7 defendant's statement that Ms. Ratliff did not provide any opinions regarding how  
8 plaintiff's impairments impacted her ability to work. *See* Defendant's Response Brief,  
9 ECF No. 19, at 3. In fact, defendant's argument on this point has no basis in fact.  
10

11         Specifically within the context of lay witness evidence, "where the ALJ's error  
12 lies in a failure to properly discuss competent lay testimony favorable to the claimant, a  
13 reviewing court cannot consider the error harmless unless it can confidently conclude that  
14 no reasonable ALJ, when fully crediting the testimony, could have reached a different  
15 disability determination." *Stout, supra*, 454 F.3d at 1056 (reviewing cases). However, if  
16 the ALJ has provided proper reasons to discount the lay testimony in another aspect of  
17 the written decision, such as within the discussion of plaintiff's credibility, the lay  
18 testimony may be considered discounted properly even if the ALJ fails to link explicitly  
19 the proper reasons to discount the lay testimony to the lay testimony itself. *See Molina,*  
20 *supra*, 674 F.3d 1104, 1121, 2012 U.S. App. LEXIS 6570 at \*24-\*26, \*32-\*36, \*45-\*46  
21 (*quoting Lewis, supra*, 236 F.3d at 512). The Court will not reverse a decision by an ALJ  
22 in which the errors are harmless and do not affect the ultimate decision regarding  
23 disability. *See Molina, supra*, 674 F.3d 1104, 2012 U.S. App. LEXIS 6570 at \*24-\*26,  
24

1 \*32-\*36, \*45-\*46; *see also* 28 U.S.C. § 2111; *Shinsheki v. Sanders*, 556 U.S. 396, 407  
 2 (2009).

3 Here, the ALJ failed to mention the lay statement and did not provide any proper  
 4 reason to discount the lay testimony in any aspect of the written decision. *See Molina*,  
 5 *supra*, 674 F.3d 1104, 2012 U.S. App. LEXIS 6570 at \*24-\*26, \*32-\*36, \*45-\*46; *see*  
 6 *also* 28 U.S.C. § 2111; *Shinsheki, supra*, 556 U.S. at 407.<sup>1</sup> For example, the ALJ does  
 7 not give any reason in his written decision not to credit Ms. Ratliff's opinion that plaintiff  
 8 had difficulties getting along with others, including supervisors. This opinion was shared  
 9 at least once by every one of plaintiff's examining doctors, such as Dr. Norma L. Brown,  
 10 Ph.D., who opined that plaintiff suffered from marked limitation in her ability to relate to  
 11

12 \_\_\_\_\_  
 13 <sup>1</sup> The Court also finds troubling defendant's misstatement of the law, with regard to an  
 14 ALJ's obligation to provide germane reasons for rejecting lay testimony. While defendant cites  
 15 *Molina v. Astrue*, 674 F.3d 1104 (9th Cir. 2012) for the proposition that that an ALJ is not  
 16 required to address each witness "on an individualized witness-by-witness basis," *see*  
 Defendant's Response Brief, ECF No. 19, p. 2, the quoted passage, placed in proper context,  
 makes clear that the ALJ does have the responsibility of commenting on each lay witness whose  
 opinion is disregarded. The full context of the quoted passage reads as follows:

17 We have held that competent lay witness testimony "*cannot* be disregarded without  
 18 comment," *Nguyen*, 100 F.3d at 1467, and that in order to discount competent lay witness  
 19 testimony, the ALJ "must give reasons that are germane to each witness," *Dodrill*, 12  
 20 F.3d at 919. We have not, however, required the ALJ to discuss every witness's testimony  
 on a individualized, witness-by-witness basis. Rather, if the ALJ gives germane reasons  
 for rejecting testimony by one witness, the ALJ need only point to those reasons when  
 rejecting similar testimony by a different witness.

21 *Molina, supra*, 674 F.3d at 1114 (emphasis in original, citations omitted).

22 Here, not only did the ALJ make no reference to Ms. Ratliff's opinions, which he  
 23 disregarded without comment, but then, defendant's counsel compounds the problem by  
 24 claiming that the ALJ didn't have to do so. The Court will assume that this was merely a  
 mistake by defendant's counsel. Otherwise, it could have grave consequences under Fed. R. Civ.  
 P. 11(b).

1 coworkers and supervisors (*see* Tr. 268; *see also* Tr. 254 (Dr. Wheeler opined that  
2 plaintiff suffered from moderate limitations in her ability to relate appropriately to  
3 coworkers and supervisors); Tr. 462 (Dr. Kruger provides identical opinion)). The ALJ  
4 also committed legal error by failing to provide any specific reason to discount this  
5 particular opinion of Dr. Brown, as discussed further below. *See infra*, section 2.

6 In fact, the ALJ's written decision is lacking proper reasons to discount any of the  
7 opinions regarding functional limitations, as discussed more fully below, *see infra*,  
8 section 2. For example, although Ms. Ratliff opined that plaintiff's ability to concentrate  
9 was affected by her impairments and that plaintiff had problems getting along with  
10 others, the ALJ found that plaintiff was "able to get along with others, understand simple  
11 instructions, [and] concentrate on and perform simple tasks" (Tr. 22). The ALJ failed to  
12 explain why Ms. Ratliff's opinions were not credited fully.  
13

14 Because of the ALJ's failure to discuss the lay evidence, and because of his failure  
15 to provide adequate reasons to discount the lay evidence elsewhere in his written  
16 decision, this matter should be reversed and remanded for further consideration. The  
17 opinions from Ms. Ratliff were relevant to the ultimate disability decision of the ALJ, and  
18 the ALJ's error in failing to review her statement is not a harmless error.  
19

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2. **The ALJ erred in his review of the medical evidence offered by treating doctor, Dr. Fleischman; and in his review of the medical evidence offered by examining psychologists, Drs. Brown, Wheeler and Krueger.**

“A treating physician’s medical opinion as to the nature and severity of an individual’s impairment must be given controlling weight if that opinion is well-supported and not inconsistent with the other substantial evidence in the case record.” *Edlund v. Massanari*, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at \*14 (9th Cir. 2001) (citing SSR 96-2p, 1996 SSR LEXIS 9); *see also* 20 C.F.R. § 416.902 (treating physician is one who provides treatment and has “ongoing treatment relationship” with claimant). The decision must “contain specific reasons for the weight given to the treating source’s medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the [] opinion.” SSR 96-2p, 1996 SSR LEXIS 9. However, “[t]he ALJ may disregard the treating physician’s opinion whether or not that opinion is contradicted.” *Batson v. Commissioner of Social Security Administration*, 359 F.3d 1190, 1195 (9th Cir. 2004) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)). In addition, “[a] physician’s opinion of disability ‘premised to a large extent upon [plaintiff]’s own accounts of h[er] symptoms and limitations’ may be disregarded where those complaints have been ‘properly discounted.’” *Morgan, supra*, 169 F.3d at 602 (quoting *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989) (citing *Brawner v. Sec. HHS*, 839 F.2d 432, 433-34 (9th Cir. 1988))).

1 The ALJ must provide “clear and convincing” reasons for rejecting the  
2 uncontradicted opinion of either a treating or examining physician or psychologist.  
3 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Baxter v. Sullivan*, 923 F.2d  
4 1391, 1396 (9th Cir. 1991); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). Even if  
5 a treating or examining physician’s opinion is contradicted, that opinion “can only be  
6 rejected for specific and legitimate reasons that are supported by substantial evidence in  
7 the record.” *Lester, supra*, 81 F.3d at 830-31 (citing *Andrews, supra*, 53 F.3d at 1043).  
8 The ALJ can accomplish this by “setting out a detailed and thorough summary of the  
9 facts and conflicting clinical evidence, stating his interpretation thereof, and making  
10 findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998); (citing *Magallanes v.*  
11 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

13 In general, more weight is given to a treating medical source’s opinion than to the  
14 opinions of those who do not treat the claimant. *Lester, supra*, 81 F.3d at 830 (citing  
15 *Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). On the other hand, an ALJ need  
16 not accept the opinion of a treating physician, if that opinion is brief, conclusory and  
17 inadequately supported by clinical findings or by the record as a whole. *Batson v.*  
18 *Commissioner of Social Security Administration*, 359 F.3d 1190, 1195 (9th Cir. 2004)  
19 (citing *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001)); see also *Thomas v.*  
20 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). An examining physician’s opinion is  
21 “entitled to greater weight than the opinion of a nonexamining physician.” *Lester, supra*,  
22 81 F.3d at 830 (citations omitted); see also 20 C.F.R. § 404.1527(d). A non-examining  
23 physician’s or psychologist’s opinion may not constitute substantial evidence by itself  
24

1 sufficient to justify the rejection of an opinion by an examining physician or  
2 psychologist. *Lester, supra*, 81 F.3d at 831 (citations omitted). However, “it may  
3 constitute substantial evidence when it is consistent with other independent evidence in  
4 the record.” *Tonapetyan, supra*, 242 F.3d at 1149 (citing *Magallanes, supra*, 881 F.2d at  
5 752). “In order to discount the opinion of an examining physician in favor of the opinion  
6 of a nonexamining medical advisor, the ALJ must set forth specific, *legitimate* reasons  
7 that are supported by substantial evidence in the record.” *Van Nguyen v. Chater*, 100 F.3d  
8 1462, 1466 (9th Cir. 1996) (citing *Lester, supra*, 81 F.3d at 831); *see also* 20 C.F.R. §  
9 404.1527(d)(2)(i).  
10

### 11 **Plaintiff’s treating physician**

12 Dr. Sally Fleischman, M.D., plaintiff’s treating physician, provided an opinion  
13 regarding plaintiff’s residual functional capacity on March 4, 2010 (*see* Tr. 514-18). She  
14 indicated that she had been plaintiff’s physician since January, 2009 (*see* Tr. 514). She  
15 also indicated her diagnoses of “Dizziness (presumed Meniere’s disease), Type II  
16 Diabetes, Chronic LBP [low back pain], [and] Anxiety disorder” (*see* Tr. 514). Dr.  
17 Fleischman opined that plaintiff was incapable of even “low stress” jobs (*see* Tr. 515). In  
18 addition, Dr. Fleishman indicated specifically on October 12, 2009 that plaintiff suffered  
19 from marked interference with many work related activities due to her impairments (*see*  
20 Tr. 457).  
21

### 22 **Plaintiff’s examining psychological doctors**

23 Dr. Keith Krueger, Ph.D. examined plaintiff on February 23, 2009 (*see* Tr. 469-  
24 76). He conducted a mental status examination (“MSE”) (*see* Tr. 474-76). Dr. Krueger

1 assessed that plaintiff demonstrated marginal to poor insight and marginal memory and  
2 concentration overall on her MSE (*see* Tr. 474). Dr. Kruger indicated specific opinions  
3 regarding plaintiff's ability to work, such as that plaintiff had a markedly severe  
4 limitation in her ability to respond appropriately to and tolerate the pressures and  
5 expectations of a normal work setting (*see* Tr. 471).

6  
7 Dr. Krueger likewise examined plaintiff on October 20, 2009 and again conducted  
8 a MSE (*see* Tr. 459-68). He opined that plaintiff suffered from limited concentration (*see*  
9 Tr. 460). Dr. Krueger opined that plaintiff's limited concentration would have a markedly  
10 severe affect on plaintiff's ability to learn new tasks efficiently (*see id.*). He also opined  
11 that plaintiff suffered from markedly severe limitations on her abilities to interact  
12 appropriately in public contacts; to respond appropriately to and tolerate the pressures  
13 and expectations of a normal work setting; and maintain appropriate behavior in a work  
14 setting (*see* Tr. 462).

15  
16 Dr. Norma L. Brown, Ph.D. examined plaintiff on November 22, 2004 (*see* Tr.  
17 292-305). She conducted a MSE (*see* Tr. 296-98). For example, Dr. Brown observed that  
18 plaintiff was highly anxious, and noted that plaintiff's husband came with her to the  
19 appointment (*see* Tr. 296). Dr. Brown observed a restricted/constricted affect (*see* Tr.  
20 298). She assessed that plaintiff demonstrated a poor fund of knowledge (*see* Tr. 296) and  
21 poor judgment/problem solving skills (*see* Tr. 292, 297).

22 Dr. Brown provided specific opinions regarding plaintiff's limitation from her  
23 impairments on her ability to function in a work environment (*see* Tr. 294). For example,  
24

1 Dr. Brown opined that plaintiff suffered from severe limitations on her ability to perform  
2 routine tasks (*see id.*). Similar to the opinion from Dr. Krueger, Dr. Brown also opined  
3 that plaintiff suffered from severe limitations on her ability to respond appropriately to  
4 and tolerate the pressures and expectations of a normal work setting (*see id.*). Dr. Brown  
5 indicated that plaintiff suffered from markedly severe limitations on her abilities to relate  
6 appropriately to coworkers and supervisors; to care for self, including personal hygiene  
7 and appearance; to control physical or motor movements and maintain appropriate  
8 behavior; and perform routine tasks (*see id.*).  
9

10 Dr. Brown examined plaintiff again on May 11, 2005 (*see* Tr. 266-79) and again  
11 performed a MSE (*see* Tr. 270-72). She assessed that plaintiff demonstrated poor  
12 concentration and low math skills (*see* Tr. 271). Dr. Brown also assessed that plaintiff  
13 demonstrated very low judgment and problem solving skills (*see id.*). Dr. Brown noted  
14 that plaintiff was a victim of domestic violence as a child and assessed that plaintiff  
15 suffered from poor insight (*see* Tr. 272).  
16

17 Dr. Brown again provided specific opinions regarding plaintiff's ability to  
18 function in a work setting (*see* Tr. 268). She opined that plaintiff suffered from severe  
19 limitations in her ability to perform routine tasks; and to respond appropriately to and  
20 tolerate the pressures and expectations of a normal work setting (*see id.*). Dr. Brown also  
21 opined that plaintiff suffered from markedly severe limitations on her abilities to  
22 understand, remember and follow complex instructions; to learn new tasks; to relate  
23 appropriately to coworkers and supervisors; to interact appropriately in public contacts;  
24 and to control physical or motor movements and maintain appropriate behavior (*see id.*).



1 Dr. Kimberly Wheeler, Ph.D. examined plaintiff on March 23, 2006 (see Tr. 252-  
2 65). She conducted a MSE (*see* Tr. 256-58). Dr. Wheeler opined that plaintiff suffered  
3 from markedly severe limitations on her abilities to exercise judgment and make  
4 decisions; to interact appropriately in public contacts; and to respond appropriately to and  
5 tolerate the pressures and expectations of a normal work setting (*see* Tr. 254). Dr.  
6 Wheeler explained that plaintiff made decisions about interactions and commitments  
7 based on anxiety, and with anticipation of anxiety, withdrew from situations (*see id.*).  
8

9 Dr. Wheeler again examined plaintiff on February 1, 2007 (*see* Tr. 242-51) and  
10 performed a MSE (*see* Tr. 246-48). Dr. Wheeler again assessed that plaintiff suffered  
11 from markedly severe limitations on her ability to respond appropriately to and tolerate  
12 the pressures and expectations of a normal work setting (*see* Tr. 244).

13 Here, the ALJ included the following discussion regarding the opinions from  
14 plaintiff's treating doctor and examining doctors:

15 Insofar as the opinions of Dr. Brown, Dr. Wheeler, Dr. Krueger, and Dr.  
16 Fleischman are inconsistent with the residual functional capacity stated  
17 above, these opinions are given little weight because they are  
18 unsupported by objective clinical findings and are inconsistent with the  
19 evidence considered as a whole. Specifically, on May 27, 2006, Cheryl  
20 Graf, ARNP, reported that the claimant's vertigo had improved (internal  
21 citation to Exhibit 5F, page 29). On February 12, 2007, Robin Garcia,  
22 PA-C, reported that he claimant denied any difficulty with breathing,  
23 fainting, or chest pain. She had no shortness of breath, palpitations, or  
24 leg cramps (internal citation to Exhibit 5F, page 9). As noted, the  
claimant testified that she had not seen a mental health professional until  
1 day before the hearing. She was not taking psychoactive medication.  
Additionally, her physician reported that she may not have Meniere's  
disease. In any event, the claimant has not reported persistent and  
uncontrollable dizziness to her treating physician.

(Tr. 26).

1 As discussed above, Drs. Brown, Wheeler and Krueger all examined plaintiff on  
2 multiple occasions and performed multiple MSEs. The Court notes that “experienced  
3 clinicians attend to detail and subtlety in behavior, such as the affect accompanying  
4 thought or ideas, the significance of gesture or mannerism, and the unspoken message of  
5 conversation. The Mental Status Examination allows the organization, completion and  
6 communication of these observations.” Paula T. Trzepacz and Robert W. Baker, *The*  
7 *Psychiatric Mental Status Examination 3* (Oxford University Press 1993). “Like the  
8 physical examination, the Mental Status Examination is termed the *objective* portion of  
9 the patient evaluation.” *Id.* at 4 (emphasis in original).

11 The MSE generally is conducted by medical professionals skilled and experienced  
12 in psychology and mental health. Although “anyone can have a conversation with a  
13 patient, [] appropriate knowledge, vocabulary and skills can elevate the clinician’s  
14 ‘conversation’ to a ‘mental status examination.’” Trzepacz, *supra*, *The Psychiatric*  
15 *Mental Status Examination 3*. A mental health professional is trained to observe patients  
16 for signs of their mental health not rendered obvious by the patient’s subjective reports,  
17 in part because the patient’s self-reported history is “biased by their understanding,  
18 experiences, intellect and personality” (*id.* at 4), and, in part, because it is not uncommon  
19 for a person suffering from a mental illness to be unaware that her “condition reflects a  
20 potentially serious mental illness.” *Van Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir.  
21 1996).

23 When an ALJ seeks to discredit a medical opinion, he must explain why his own  
24 interpretations, rather than those of the doctors, are correct. *Reddick, supra*, 157 F.3d at

1 725; *see also Blankenship, supra*, 874 F.2d at 1121 (“When mental illness is the basis of  
2 a disability claim, clinical and laboratory data may consist of the diagnosis and  
3 observations of professional trained in the field of psychopathology. The report of a  
4 psychiatrist should not be rejected simply because of the relative imprecision of the  
5 psychiatric methodology or the absence of substantial documentation”) (*quoting Poulin v.*  
6 *Bowen*, 817 F.2d 865, 873074 (D.C. Cir. 1987)).

7  
8 As an initial matter, the Court notes that the ALJ appears to have misunderstood  
9 the meaning and import of the MSE. Although the ALJ found that Dr. Brown, Dr.  
10 Wheeler and Dr. Krueger provided opinions not based on objective clinical findings, the  
11 MSE, as indicated previously, “is termed the *objective* portion of the patient evaluation.”  
12 *See Trzepacz, supra*, The Psychiatric Mental Status Examination 4 (emphasis in original).  
13 In addition, the Court specifically has identified some of the objective observations and  
14 assessments of the examining doctors from their reports in the discussion above, *see*  
15 *supra*, DISCUSSION, section 1. Based on a review of the relevant record, the Court finds  
16 that the ALJ’s finding that plaintiff’s examining doctors’ opinions were not based on  
17 objective clinical findings is not based on substantial evidence in the record as a whole.  
18 *See Magallanes, supra*, 881 F.2d at 750 (*quoting Davis, supra*, 868 F.2d at 325-26).

19  
20 Secondly, although the ALJ found that the opinions of examining doctors, Drs.  
21 Brown, Wheeler and Krueger, were inconsistent with the evidence considered as a whole,  
22 the only evidence specified by the ALJ is a few pieces of information about some of  
23 plaintiff’s physical complaints (*see* Tr. 26). Regarding plaintiff’s mental impairments, the  
24 ALJ does not explain why the fact that plaintiff was not receiving mental health treatment

1 necessarily negates the functional opinions of examining mental health specialists  
2 regarding plaintiff's ability to work.

3       When a mental illness is involved, assuming that a failure to comply with  
4 prescribed treatment suggests a *willful* failure to comply with prescribed treatment can be  
5 illogical. This is in part because a person suffering from a mental illness may not realize  
6 that she needs her medication, or she may not even realize that her "condition reflects a  
7 potentially serious mental illness." *See Van Nguyen, supra*, 100 F.3d at 1465. "[I]t is a  
8 questionable practice to chastise one with a mental impairment for the exercise of poor  
9 judgment in seeking rehabilitation." *Id.* (quoting with approval, *Blankenship v. Bowen*,  
10 874 F.2d 1116, 1124 (6th Cir. 1989)).  
11

12       Although it is a questionable practice to chastise one with a mental impairment  
13 with faulty judgment in failing to seek mental health treatment, it is an even more  
14 questionable practice to imply without further explanation that a mentally ill person's  
15 failure to seek mental health treatment negates the opinions of mental health specialists  
16 who examine the person and perform mental status examinations. *Cf. id.*

17       In addition, the ALJ's finding that plaintiff was not taking any psychoactive  
18 medication is contrary to plaintiff's testimony and contrary to subsequent notations in the  
19 record (*see* Tr. 45, 519). The ALJ has not explained this finding, which appears to be  
20 lacking substantial evidence in the record as a whole. *See Magallanes, supra*, 881 F.2d at  
21 750 (quoting *Davis, supra*, 868 F.2d at 325-26).  
22

23       For the stated reasons and based on the relevant record, the Court finds that the  
24 findings by the ALJ regarding the opinions of Drs. Brown, Krueger and Wheeler are not

1 based on substantial evidence in the record as a whole. *See Magallanes, supra*, 881 F.2d  
2 at 750 (*quoting Davis, supra*, 868 F.2d at 325-26). The Court concludes that the ALJ  
3 failed to provide specific and legitimate reasons for his failure to credit fully opinions  
4 from these examining doctors and failed to evaluate the medical evidence properly. *See*  
5 *Lester, supra*, 81 F.3d at 830-31 (*citing Andrews, supra*, 53 F.3d at 1043).

6       Regarding the opinion of treating physician, Dr. Fleischman, the Court finds that  
7 the ALJ did not adequately explain his failure to give controlling weight to Dr.  
8 Fleischman's opinion as a treating physician, *see Edlund, supra*, 2001 Cal. Daily Op.  
9 Srv. 6849, 2001 U.S. App. LEXIS 17960 at \*14 (*citing SSR 96-2p*, 1996 SSR LEXIS  
10 9), and failed to provide specific and legitimate reasons for his failure to credit fully Dr.  
11 Fleischman's opinions, *see Lester, supra*, 81 F.3d at 830-31 (*citing Andrews, supra*, 53  
12 F.3d at 1043).

13  
14       In a case in which the Ninth Circuit found that an ALJ had failed to provide  
15 specific and legitimate reasons supported by substantial evidence in the record for the  
16 failure to credit fully the opinion of a treating physician, the written decision by that ALJ  
17 had included the following discussion:

18       The opinions of total disability tended [sic] in the record are unsupported  
19 by sufficient objective findings and contrary to the preponderant  
20 conclusions mandated by those objective findings. The duration of the  
21 claimant's stress treadmill testings and relative lack of positive findings,  
22 the results of other laboratory and x-ray testing, the objective  
23 observations of the physicians of record, all preponderate toward a  
24 finding that the claimant has never lost the residual functional capacity  
for light work for any period approaching 12 months.

1 *Embrey v. Bowen*, 849 F.2d 418, 421 (9th 1988). The Ninth Circuit Court found that  
2 these statements by the *Embrey* ALJ were not sufficient to discount the doctors' opinions,  
3 even though the *Embrey* ALJ had reviewed the medical evidence *Id.* (citations omitted)

4 The court explained:

5 To say that medical opinions are not supported by sufficient objective  
6 findings or are contrary to the preponderant conclusions mandated by the  
7 objective findings does not achieve the level of specificity our prior  
8 cases have required, even when the objective factors are listed seriatim.  
9 The ALJ must do more than offer his conclusions. He must set forth his  
10 own interpretations and explain why they, rather than the doctors', are  
11 correct. Moreover[,] the ALJ's analysis does not give proper weight to  
12 the subjective elements of the doctors' diagnoses. The subjective  
13 judgments of treating physicians are important, and properly play a part  
14 in their medical evaluations.

15 *Id.* at 421-22 (internal footnote omitted).

16 The Court finds that this discussion applies to the ALJ's written decision in the  
17 matter herein. *See id.* The ALJ here has not provided a detailed explanation of his  
18 findings or his interpretations; and, perhaps more importantly, has not explained  
19 sufficiently why his interpretations are more correct than plaintiff's treating physician. *See*  
20 *id.* The Court concludes that the ALJ failed to evaluate properly the medical evidence  
21 offered by treating physician, Dr. Fleischman, and did not provide specific and legitimate  
22 reasons to discount her opinions. *See id.*; *see also Lester, supra*, 81 F.3d at 830-31;  
23 *Andrews, supra*, 53 F.3d at 1043.

24 The ALJ's failure to evaluate the medical evidence properly provides an additional  
reason as to why this matter should be reversed and remanded for further consideration.

3. **Despite the errors committed by the ALJ, this matter should be remanded for further proceedings -- not for an award of benefits.**

The ALJ failed to discuss the lay evidence, committing obvious legal error. This lay statement clearly indicates relevant opinions regarding plaintiff's ability to function in a work environment, making the error harmful. The ALJ also provided only a general statement in support of his rejection of all of the opinions from examining and treating doctors, in favor of opinions from medical consultants who never examined plaintiff. Such treatment of the medical evidence is contrary to federal regulations, internal social security regulations and relevant case law.

Nevertheless, credibility assessments and the resolution of conflicts in the medical evidence are within the responsibility of the ALJ. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998); *Andrews, supra*, 53 F.3d at 1043.

Generally, when the Social Security Administration does not determine a claimant's application properly, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put forth a "test for determining when [improperly rejected] evidence should be credited and an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000). It is appropriate when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

1 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th  
2 Cir.1996)).

3 Here, outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292.  
4 Furthermore, the decision whether to remand a case for additional evidence or simply to  
5 award benefits is within the discretion of the court. *Swenson v. Sullivan*, 876 F.2d 683,  
6 689 (9th Cir. 1989) (citing *Varney v. Secretary of HHS*, 859 F.2d 1396, 1399 (9th Cir.  
7 1988)).

8 The ALJ is responsible for determining credibility and resolving ambiguities and  
9 conflicts in the medical evidence. *Reddick, supra*, 157 F.3d at 722; *Andrews, supra*, 53  
10 F.3d at 1043. If the medical evidence in the record is not conclusive, sole responsibility  
11 for resolving conflicting testimony and questions of credibility lies with the ALJ. *Sample*  
12 *v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1999) (quoting *Waters v. Gardner*, 452 F.2d  
13 855, 858 n.7 (9th Cir. 1971) (citing *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir.  
14 1980))).

15 Therefore, remand is appropriate for this matter in order to allow the  
16 Commissioner the opportunity to consider properly all of the lay and medical evidence as  
17 a whole and to incorporate the properly considered lay and medical evidence into the  
18 consideration of plaintiff's credibility and residual functional capacity. *See Sample*,  
19 *supra*, 694 F.2d at 642.

## 20 CONCLUSION

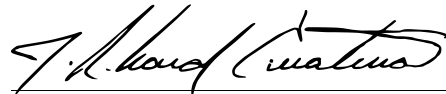
21 Based on the stated reasons and the relevant record, the undersigned recommends  
22 that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42  
23  
24



1 U.S.C. § 405(g) to the Commissioner for further consideration. **JUDGMENT** should be  
2 for **PLAINTIFF** and the case should be closed.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
4 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.  
5 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
6 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).  
7 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
8 matter for consideration on February 1, 2013, as noted in the caption.  
9

10 Dated this 14th day of January, 2013.

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12 

13 J. Richard Creatura  
14 United States Magistrate Judge  
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